

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Restoration Order
Issued to John P. Breese

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATION

This matter was heard on November 18, 2004, and March 30 and 31, 2005, in Annandale, Minnesota before Administrative Law Judge Allan W. Klein. The parties submitted additional evidence by Stipulation on August 8, 2005, and the final Brief was received on August 31, 2005.

Appearing on behalf of the Department of Natural Resources was Assistant Attorney General Jill Schlick, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127.

Appearing on behalf of John P. Breese was Bruce E. Grostephan, of the firm of Peterson, Engberg & Peterson, 700 Old Republic Title Building, 400 Second Avenue South, Minneapolis, MN 55401-2498.

NOTICES

This report is only a recommendation to the Commissioner of Natural Resources, and is not a final decision. The Commissioner will make his final decision after reviewing this report and the hearing record. In making that decision, the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation that appear in this report.

Under Minnesota law,¹ the Commissioner may not make his final decision until after the parties have had access to this report for at least 10 days. During that time, the Commissioner must give any party adversely affected by this report an opportunity to file objections to the report and to present arguments supporting its positions. Parties should contact the office of Gene Merriam, Commissioner, MN Department of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155, to find out how to file exceptions or present argument.

The record of this contested case proceeding closes upon the filing of comments on the report with the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of a date

¹ Minn. Stat. § 14.61.

on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute a final agency decision.²

STATEMENT OF ISSUES

The fundamental issue to be addressed is whether or not the Commissioner's Restoration Order was based on accurate facts. This breaks down into the initial question of whether or not the Department has demonstrated, by a preponderance of the evidence, that Breese placed fill and other material in the bed of Twin Lake below the ordinary high water line in violation of statute and rule. If so, then the question becomes whether or not Breese has demonstrated, by a preponderance of the evidence, that he meets the various tests set forth in statute and rule for an after-the-fact permit. The governing rule was amended in 2002, and actions that were permissible before the effective date of the amendment were no longer permissible after the amendment. Which portion of Breese's work was subject to the old rule, and which portion was subject to the new rule?

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. West Lake Sylvia (86-279) is located near the City of Annandale in Wright County. It is sometimes referred to as Twin Lake. It is a relatively large lake which lies generally north and south. The area of interest to this proceeding is located in the southwest corner of the lake in Section 5 of French Lake Township, T. 120 N, R. 28 W.

2. John P. Breese has owned property on West Lake Sylvia since 1977 or 1978. He lived near the Twin Cities until 1997, when he and his wife moved out to West Lake Sylvia on a full-time basis. Well before then, however, Breese set about to improve his property and build a new home. As early as 1990, Breese had contact with Dale Homuth, who was then the Department's area hydrologist. Homuth approved Breese's plan to install a culvert. In September of 1991, Breese corresponded with Homuth concerning substantial landscaping work that Breese was proposing to do on the north half of his property. Breese proposed to place filter fabric and rock riprap along the shoreline on the northern part of his property. Homuth informed him that a DNR permit was not required so long as Breese followed the conditions listed in the DNR's riprap brochure.³ Homuth noted that since all of the proposed fill would be on land above elevation 1050.1 feet (the officially-established natural ordinary high water level), no DNR permit would be required.⁴ Homuth did note that Breese would have to obtain a land alteration permit from Wright County.

² See, Minn. Stat. § 14.62, subd. 2a.

³ DNR Ex. 50.

⁴ Breese Ex. 3.

3. On August 3, 1992, Homuth wrote to Breese, indicating that Breese had to make changes in rock riprap which he was placing along the lakeshore at the north end of his property. Breese had been setting large rocks on top of each other vertically, making what was essentially a retaining wall, and placing fill behind it. This kind of design was contrary to the Department's riprap rule and brochure, which stated that no permit was required so long as the minimum finished slope of installed riprap was no greater than three feet horizontal to one foot vertical.⁵

4. On August 13, 1992, Breese wrote to the Wright County Planning and Zoning Commission, asking for authorization to make certain land alterations. Most of the work had to do with the northern part of the property, and is not relevant to this proceeding. However, in the same letter Breese also indicated that he was seeking permission to fill "low areas" as noted on an attached survey, which proposed fill would include both the north and south portion of his land. Breese noted that his goal with regard to the southern part of his property was to develop it into an area "that can be maintained and used." Underbrush would be removed, trees would be thinned and trimmed, and grass would be planted. Breese stated his intention to level an area "around the water" approximately three feet above water level. The southern lot does contain a wetland immediately to the east of the lakeshore, and Breese noted that the "Soil and Water Department" had staked out the wetland, and no fill would be placed within the marked areas. Breese did propose to place fill between the wetland and the lakeshore in this southern area.⁶

5. On August 27, 1992, Homuth met with Breese and Breese's contractor, Rodney Beuch, and determined that Beuch was nearly done rearranging the riprap on the northern end of the property as Homuth had requested. Homuth also staked the edge of the ordinary high water level at the southern end of Breese's property because Breese planned to extend the rock riprap to his southern property line. Homuth warned Breese not to place any rock more than five feet lakeward of the stakes, and be sure the rocks were placed on a slope and not stacked on top of each other vertically. These admonitions were memorialized in a letter from Homuth to Breese dated August 27, 1992.⁷

6. At some time in the fall of 1992, Breese and Beuch did set boulders along the shoreline at the southern end of Breese's property.⁸ Most of the boulders were in a single line, but at the far southern end of the string, a few were placed on top of each other to mark the property line.

7. In 1996, Ken Schumacher purchased the house immediately to the south of Breese's property. He noted the boulders at the south end of Breese's property.⁹ In May of 2002, when Schumacher applied to the County for a riprapping permit, he

⁵ DNR Ex. 50 and Tr. 250.

⁶ DNR Ex. 11 and Breese Ex. 2.

⁷ Breese Ex. 4.

⁸ Tr. 335, 349, and Breese Ex. 14.

⁹ Tr. 271 and 275.

indicated that he wanted to “tie into the existing boulders” (Breese’s boulders) that were already there.¹⁰

8. What prompted Schumacher to apply for a permit in May of 2002 was an erosion problem which he was encountering on a sand beach blanket at the shoreline of West Sylvia Lake. This erosion problem can be seen in Breese Exhibit 23, which shows rock riprap (small rocks, less than 12 inches in diameter) on the south side of Schumacher’s property, but a sand blanket on the north side of Schumacher’s property. There is obvious erosion at the lakeward edge of the sand blanket. There is no lakeward vegetation which would protect against erosion from wave action.

9. The spring and summer of 2002 were difficult times for landowners around West Lake Sylvia. While there is not continuous lake level data available, the volunteer monitoring data demonstrates that the lake was near the ordinary high of 1050.1 throughout May and early June, but then in mid-June the lake jumped above the ordinary high to a level of approximately 1050.6 and stayed well above the ordinary high in June and July. Then in early August, the lake began to climb, reaching a peak of 1051.2 in mid-September. The highest recorded level was 1051.23 on September 11, but there could well have been higher levels because the recording was not continuous. In mid-September, the lake began to decline, but still stayed well above the ordinary high for the rest of the year.¹¹ These data are confirmed by a representative of the Greater Lake Sylvia Association who testified that water levels in 2002 were “the highest it’s ever been since we started recording it, I think it was 26 years ago... I think there was damage to all the properties...”¹²

10. The rains that caused the high water level on the lake also affected Breese’s property. In June, the county road that serves as the eastern boundary of Breese’s property suffered a washout along its western shoulder, and a substantial amount of sediment slid down the roadbank into the pond (wetland) between the road and the lake. Between June 25, and July 19, French Lake Township paid a contractor to deliver large quantities of fill, gravel and bituminous hot mix to repair the damage to the road.¹³

11. When the lake level was high, boat wakes and winds caused lake water to wash over the top of the boulders which Breese had placed along the shoreline of the southern end of his property in 1992. This disturbed his fabric filter and eroded fill which he had placed behind the rocks (on the upland side of the rocks). He decided that he wanted to add another layer of rocks to the existing boulders at the southern end of his property.¹⁴

¹⁰ Tr. 271.

¹¹ DNR Ex. 47, Lake Levels for East Lake Sylvia, which is hydrologically and physically connected to West Lake Sylvia.

¹² Tr. 81. Following the damage from the 2002 high water, the drainage capacity at the lake’s outlet was increased dramatically. This is detailed at Tr. 81.

¹³ Breese Ex. 24.

¹⁴ Tr. 416.

12. During calendar year 2002, Breese did not take any action to add another layer of rocks, or otherwise increase the length of his riprap on the southern end of his property.

13. On October 14, 2002, the rule relating to placement of riprap without a permit was amended by the Department. Of significance to this proceeding is the fact that the new rule now required evidence of erosion prior to the placement of riprap, whereas the old rule did not. The new rule also placed limits on the size of rocks which are allowed to be used for riprap. Neither the new rule nor the old rule allowed the placement of fill for riprap. Both rules required the use of rock for riprap.

14. In 2003, Breese began to “repair” the damage caused by the road washout. He began excavating the sediment, which had washed down into the wetland area from the road shoulder. He did not request a permit for this work, and on April 24, 2003, DNR Conservation Officer Jim Smith issued a Cease and Desist order to Breese under the Wetlands Conservation Act.¹⁵ In addition to issuing the Wetlands Conservation Act Cease and Desist Order, Smith also sent an electronic message to Patricia Fowler, the area hydrologist. The email alerted Fowler to the possibility that there had been a protected waters violation, as well as a Wetland Conservation Act violation.

15. On May 22, 2003, Colleen Allen of the Wright County Soil and Water Conservation District and Patricia Fowler met at the site. They determined that Breese’s excavation work had been close to the ordinary high water level, but that most of it was above the ordinary high. Therefore, they determined that Allen would take the lead role in the matter.¹⁶

16. Roughly a month later, on June 26, 2003, Allen, Fowler, and a representative of the Corp of Engineers all met at the property. At that time, Allen was still attempting to determine whether or not there had been a violation of the Wetlands Conservation Act.¹⁷ Allen drew a sketch indicating that there was an area of fill lying between the pond and the lake that she wanted to have removed. She believed that fill had been placed between the wetland and the lake. She was willing to leave the fill closest to the wetland area alone, but she wanted one foot of fill removed from a roughly 1500 square foot area along the lakeshore, extending from the lakeshore back towards the wetland. At its greatest width, this area of fill was roughly 20 feet wide, and at its greatest length, it was roughly 100 feet long. The area that Allen wanted removed is shown on a document labeled “Attachment C” to her letter of July 23, 2003 to Breese’s attorney, Bruce Grostephan.¹⁸

17. Following the on-site meeting of June 26, Conservation Officer Brian Mies prepared a Wetlands Conservation Act Restoration Order, and on July 9, 2003, he served it upon Breese. Mies and Allen were both unaware of Breese’s prior placement

¹⁵ DNR Ex. 12.

¹⁶ Tr. 27 and 193.

¹⁷ Tr. 193.

¹⁸ Breese Ex. 34.

of boulders, fabric and fill along the shoreline in 1992. The 2003 Order contains Findings of Fact indicating that fill material had been placed along a beach ridge to create a berm between the wetland and the lake, and that several large boulders had been placed on the fill material and within the lake. It further notes that additional piles of smaller rocks had been placed on the beach ridge. The order included a copy of Allen's June 27 drawing, as well as a photograph illustrating the portion of fill which Allen wanted removed.¹⁹

18. On July 18, 2003, Allen met on the site with Breese, Grostephan, and a township supervisor. They discussed the washout of the road shoulder and the fact that Breese had built a rock retaining wall between the road and the wetland area in order to prevent further washouts carrying sediment into the wetland. Allen agreed that the wall could remain there, as removing it would probably cause more damage than leaving it. With regard to the fill between the wetland and the lake, part of which Allen had ordered be removed, it was agreed that although there was up to two feet of fill in some places, Breese would only have to remove one foot of the fill. On July 21, Grostephan wrote Allen a letter, memorializing his understanding of the agreement. On July 23, Allen replied to Grostephan, indicating that Breese should remove approximately 12 inches of the material from the area indicated in her drawing. Allen made reference to a 1992 survey which Breese had provided to the Wright County Soil and Water Conservation District in connection with his plans for grading primarily the north part of his land, but also the south part as well. Allen indicated that although the Restoration Order and the one-foot agreement would cause Breese's southern land to be roughly a foot lower than what he had indicated he wanted in 1992, it would still be close to his desires. Allen attached a copy of the 1992 survey to her letter. It was agreed that Breese would have until August 15 to complete the work, but that he could have additional time if needed.²⁰

19. At some time between July 18 and September 19, 2003, Breese had his contractor, Rodney Beuch, work in the area. Beuch did remove the 12 inches of fill, but he also added a second layer of rocks on top of the 1992 rocks, and extended the rock riprapping to the north by another eight boulders. In addition, he placed fill behind the rock in order to stabilize the fabric filter that he used.²¹

20. On September 19, 2003, Conservation Officer Brian Mies went to the site to check on the WCA restoration work. Mies was unaware of the 1992 work and the fact that a row of boulders, with fabric and fill, had been placed along the shoreline and had remained there since 1992.²² On September 19, 2003, Mies observed signs of recent activity, including the rows of rock and fill in the lake. Mies told Breese and attorney Grostephan that he was disappointed in Breese. Breese admitted that he did place additional boulders and new fill in the lake. Mies told him to take everything out that he had put in. Mies did not distinguish between what had been done in 1992 and 2003, because he was unaware of that distinction. He told Breese to remove everything

¹⁹ DNR Ex. 13.

²⁰ Breese Exs. 26 and 34, respectively.

²¹ Tr. 357 and 394.

²² Tr. 462 and 466.

he had put in.²³ Mies did tell Breese that he would not issue a citation if Breese agreed to take “it” out, and Breese did agree to take “it” out.²⁴ There was a lack of communication -- Mies was referring to *all* of the rock and fill, while Breese was referring to just the *new* rock and fill.

21. On September 21 and 22, Breese removed the second layer of boulders and some of the fill.²⁵ In addition, Breese removed the eight new boulders that he had recently placed immediately north of the 1992 boulders.²⁶

22. On September 21, 2003, Mies returned to inspect Breese’s progress. He determined that approximately half the fill had been removed. Breese was not present when Mies was there, but within the next few days, Mies spoke with Breese and told him that the restoration was not good enough. Breese said he had removed all of the new fill and boulders, and Breese became frustrated when Mies would not accept that explanation. Finally, Breese told Mies that if he wasn’t satisfied with what had been done, he should just issue Breese a ticket. They agreed that Mies would have Patty Fowler come out and look at the situation.²⁷

23. On September 26, 2003, a meeting took place at the site between Fowler, Breese, Grostephan and Schumacher. Fowler determined that fill and rock had been placed below the ordinary high water level and told Breese and Grostephan that the soil and rock had to be taken out of the lake down to the original grade level. She further informed them that the rule now required that there be an erosion problem evident before riprap could be placed, and that she did not see any erosion problem at the site.²⁸ She took photographs that demonstrate that boulders and fill had been placed into emergent vegetation.²⁹ That vegetation was damaged by the work.³⁰

24. On October 9, Grostephan and Fowler spoke by telephone. Grostephan told Fowler that Breese wanted to keep the shoreline the way it was. Breese wanted to seed it and keep the erosion blanket (fabric filter) in place. Fowler replied that if Breese felt there was still an issue with erosion, the Department would work with him, but that the fill would need to come out (including the boulders) and that it was her opinion that riprap was not necessary.

25. On October 13, 2003, Mies returned to the site. He noticed signs of recent work, but it appeared to him that the fill which had been removed on September 21 and 22 had been put back on the site. He concluded that Breese was not going to cooperate, and so he issued Breese a criminal Summons and a Cease and Desist Order.

²³ Id.

²⁴ Tr. 225-226.

²⁵ Tr. 358.

²⁶ Tr. 398.

²⁷ Tr. 226-227.

²⁸ Id.

²⁹ DNR Exs. 21 – 25.

³⁰ Tr. 212-221.

26. On the following day, October 14, Fowler received a voice message from attorney Grostephan indicating that Breese had been working on removing fill on October 11, and had been scraping it down.³¹

27. On October 26, Fowler met with Grostephan at the site. She determined that the fill she wanted removed had not been removed and, in fact, that additional rock and fill had been placed between September 26 and October 26.³² Breese, however, denied that he had done anything after the Cease and Desist Order.³³

28. The October 13, 2003 Cease and Desist Order not only directed Breese to stop all work, but it also directed him to immediately submit a written project application form within three weeks.³⁴ The Department computed that the deadline expired on November 3.³⁵ On October 29, attorney Grostephan sent a letter to Fowler, indicating that Breese believed that there is an erosion problem and asking whether Breese could obtain a permit to repair the area.³⁶

29. On November 12, 2003, Fowler and Mies inspected the property and took more photographs. Mies noted that things had been changed from his prior visit (October 13), but he couldn't say positively that additional fill had been placed below the ordinary high.³⁷ Fowler, however, concluded that there had been additional rock and fill placed below the ordinary high, including an additional layer of geotextile fabric.³⁸

30. On December 22, 2003, in response to the criminal Summons, Breese pled guilty to altering the cross section of a lake without a permit.³⁹ A fine was imposed, which he paid.

31. On December 30, 2003, Fowler and Grostephan met. Fowler served Grostephan with a Public Waters Restoration Order directing Breese to remove all fill material, including rock riprap and filter fabric, placed waterward of the ordinary high water level elevation of 1050.10. The Order included a copy of Allen's June 27, 2003 drawing as well as a plan view prepared by Fowler on December 29. The major difference between the two drawings is the amount of fill to remove – Allen had initially required that fill be removed from a roughly 1500 square foot area, while Fowler's area was only approximately 330 square feet. Fowler's Order requires the fill material be removed "down to the original lake bed", and that the fill be removed to an upland site and not re-deposited in lakes or wetlands. The Order required that the restoration be completed by June 10, but that no work be done between ice out and June 1.⁴⁰

³¹ DNR Ex. 43.

³² Tr. 62.

³³ Tr. 415-416.

³⁴ DNR Ex. 2.

³⁵ DNR Ex. 43.

³⁶ DNR Ex. 43.

³⁷ Tr. 231.

³⁸ Tr. 62-66.

³⁹ DNR Ex. 3.

⁴⁰ DNR Ex. 4.

32. At that same meeting on December 30, Grostephan attempted to give Fowler a permit application form. The form requests a permit to “install boulders to stabilize shoreline and slow water flow from upland to lake.” The application included a drawing illustrating a row of two boulders (one on top of the other) with geotextile fabric material draped over both. There would be backfilling behind the rocks (on the upland side). The application requested that this line of boulders be placed for 45 feet, beginning at Breese’s southern boundary, and extending to the north. The application explained that the bottom layer of boulders had already been installed in 1991-1992 and that the purpose of the proposed work was to correct/minimize the effects of wave erosion from the lake and also to reduce the slope of the shore to reduce the rate of water runoff. Fowler would not accept the application.⁴¹

33. On January 27, 2004, attorney Grostephan filed an appeal of the Public Waters Restoration Order.⁴² After an internal review, the Department determined that the Restoration Order was appropriate.⁴³

34. A hearing was tentatively scheduled for October 21 and 22, but during a prehearing conference on September 22, it was agreed that the hearing would be delayed until November 18 and 19.

35. On October 5, 2004, the Department issued a Notice of Hearing, setting the hearing for November 18 and 19 in Annandale. On October 20 and 27, notice of the hearing was published in the Annandale newspaper.

36. On November 12, 2004, Fowler and Allen returned to the site and Fowler drilled a soil boring test hole on the northeast corner of the disturbed area.⁴⁴ She measured the ground level at the top of the boring to be at 1050.49 feet. She then identified a line of vegetation inside the hole that was .89 feet (10.7 inches) below the ground elevation.⁴⁵ That would place the line of vegetation at 1049.6. She assumed that the vegetation marked the original (pre-fill) ground elevation. The OHWL is set at 1050.1, so that means that there has been at least .5 feet (6 inches) of fill that has been placed below the OHWL. The Administrative Law Judge accepts Fowler’s assumption and, measurements as the best available evidence of the fill that has been placed below the OHWL. See, Memorandum.

37. On November 16, 2004, Fowler returned to the site with John Scherek, a department surveyor. Fowler located two places where the ground elevation was 1050.1 that also “represented the most unmodified natural landscape at the site and ... adjacent to the fill area.”⁴⁶ These two points were located at each end (north and south) of the fill area. She then extended a measuring tape between the two points to represent the 1050.1 OHWL line. She then surveyed the land between the tape and the

⁴¹ Breese Ex. 6 and Tr. 71.

⁴² DNR Ex. 5.

⁴³ DNR Ex. 9.

⁴⁴ DNR Exs. 29-31.

⁴⁵ Tr. 97-110.

⁴⁶ Tr. 118.

lakeshore to determine what fill had been placed below the ordinary high.⁴⁷ The Administrative Law Judge accepts Fowler's assumptions, measurements and survey as the best available evidence, and a reasonable estimate, of the extent of fill that has been placed below the OHWL. See, Memorandum.

38. On November 18, 2004, the hearing did commence in Annandale, but after taking some testimony and a site visit, the hearing was continued to March 30, 2005. On March 16, the Department published a second Notice of Hearing.⁴⁸ The hearing did resume on March 30 and was completed on March 31. Pursuant to an agreement reached during the hearing, a stipulation with an additional exhibit was filed on August 8.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner has jurisdiction in this matter pursuant to Minn. Stat. § § 14.50; 103G.251; 103G.2372, subd. 1; 103G.311 and 103G.315.

2. The Department gave proper and timely notice of the hearing, and it also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge and the Commissioner.

3. Minn. Stat. § 176.103G.245, subd. 1(2) (2004) provides the basic prohibition against filling in public water. That statute specifies that a person must obtain a public waters work permit from the Department in order to "change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing the materials in or on the beds of public waters." There is no dispute that Breese did not have a permit prior to placing materials in the bed of West Lake Sylvia in either 1992 or 2003.

4. The boulders placed at the southern end of Breese's property in 1992 were consistent with the version of the riprap rule then in effect, and were placed in conformance with the stakes set by Dale Homuth in 1992. Therefore, they were not placed in violation of any statute or rule, and they (along with the fabric filter) may remain in place, and may be maintained as necessary, without a permit. However, any dirt fill placed in 1992, and any subsequent additions to those boulders, whether vertically or horizontally, placed below 1050.1 is not authorized by Homuth's 1992 action and must meet current rules of the Department.

5. None of the fill placed in either 1992 or 2003 below 1050.1 line identified by the Department may remain in place, unless the Commissioner determines that it is better to leave it than to remove it.

⁴⁷ DNR Ex. 43.

⁴⁸ DNR Ex. 49.

6. Minn. Rule pt. 6115.0190, subp. 3(B) (2003) prohibits the placement of fill “to create upland areas, except where expressly provided herein.” Breese’s placement of fill below 1050.1 had the effect of creating additional upland area in violation of this standard.

7. Minn. Rule pt. 6115.0190, subp. 3(A) (2003) prohibits the placement of fill to achieve vegetative control. Breese’s filling had the effect of achieving vegetative control in violation of this standard. Similarly, Minn. Rule pt. 6115.0215, subp. 4(E) (6) (2003) provides that riprap may not cover emergent vegetation unless authorized by an aquatic plant management permit. Breese did not obtain such a permit, and thus his placement of additional boulders and filling in 2003 violated this requirement.

8. Minn. Rule pt. 6115.0190, subp. 5(E) and 6115.0215, subp. 5(A) (both 2003) require that a proposed project represent the minimal impact solution to a specific need. There has been no showing that the additional boulder and fill placed in 2003 met this standard, considering other alternatives such as planting vegetation.

9. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

10. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the foregoing Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

1. That the Commissioner AFFIRM the terms of the Restoration Order with respect to the work done in 2003, but that he modify it to allow the boulders and fabric placed in 1992 to remain.

2. That the Commissioner order John B. Breese to take such action as the Commissioner deems necessary and appropriate to restore the public waters of West Sylvia Lake to the condition existing before the work done in 2003 except as the Commissioner may determine the public interest is better served by allowing certain materials to remain, rather than be removed. See, Memorandum.

Dated this 26th day of April, 2011

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape-Recorded,

NOTICE

The Commissioner is requested to serve a copy of his final decision upon the Administrative Law Judge pursuant to Section 14.62, subd. 1.

MEMORANDUM

The fundamental issue to be decided is whether, in fact, Breese placed boulders, fabric and fill in 1992, and then did additional work in 2003, or whether he did nothing in 1992, and did all of the work in 2003. Breese, his contractor Beuch, and his neighbor Schumacher all claim that boulders, fabric, and fill were placed in 1992, and then added to in 2003. But the Department witnesses Fowler and Mies claim that they know nothing of the 1992 work, and that they believe that all of the boulders, fabric and fill were placed in 2003. The Administrative Law Judge has found that there were boulders, fabric and fill placed in 1992. He reached that decision primarily because Schumacher, the neighbor who bought the house just south of Breese's in 1996, is pretty much disinterested in the outcome of this case, yet he testified that Breese's boulders were there prior to 2002. Schumacher believes they were there when he first moved to the lake in 1996. In 2002, when Schumacher wanted to get a permit to do his own riprapping, he stated on the permit application that he wanted to "tie into the existing boulders that were there." In light of this testimony, the Administrative Law Judge believes that boulders, fabric and fill were placed there in 1992.

The 1992 boulders and fabric placement was legitimate under the standards and circumstances then in effect, and it may remain in place. But the fill that was placed behind the boulders, to the extent it was placed below the ordinary high, was not lawful. Even under the more relaxed rule in effect back in 1992, rocks were allowed to be used for riprapping, but fill was not allowed. Moreover, the 2003 work did not conform to the new standards and there is no legal basis to consider the new work to be "grandfathered" or otherwise authorized as "merely maintenance" on the 1992 work.

One of the new standards for placing riprapping without a permit is that there must be evidence of erosion. There has been a substantial change in West Lake Sylvia's hydrologic regime that ought to eliminate a repetition of all (or almost all) of the erosion damage that occurred in 2002. The lake's outlet has been reconfigured to dramatically increase the outflow. This means that even if the unusual rains of 2002 do reoccur, the lake will empty out much faster than before, and thus the erosion damage that comes with high lake levels should be dramatically reduced. Given this change, it is appropriate to defer any more riprapping work on Breese's property until there is actual evidence of erosion.

An absolutely precise delineation of the pre-fill boundaries of the site is virtually impossible for anyone to determine. There has been so much activity there since 1992

that it would be unreasonably burdensome for either the Department or Breese to be held to an exacting standard. Fowler's measurements presented on the survey (Exhibit 42, discussed in Finding 37, above) are not perfect. For example, she assumed that all of the land lakeward of her line was the result of filling. That is not necessarily so. No doubt there was land below that line that was natural. But given the amount of work that Breese has done in the area, Fowler's method is a reasonable way to define the extent of the fill. That imprecision does create an opening for the Commissioner and Breese to attempt to negotiate a mutually acceptable resolution of this dispute. Even though the Commissioner is within his legal rights to enforce the Restoration Order and demand that Breese remove all the fill below 1050.1, he may want to work with Breese in an attempt to make the shoreline appear as natural and undisturbed as is possible, even if that means that Breese does not remove all of the fill. But that is the Commissioner's choice, not Breese's.

A.W.K.